

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF ANTONIO DEL  
VALLE RUIZ AND OTHERS FOR AN  
ORDER TO TAKE DISCOVERY FOR USE  
IN FOREIGN PROCEEDINGS PURSUANT  
TO 28 U.S.C. § 1782,

Petitioners,

Case No. 18 Misc. \_\_\_\_\_

**DECLARATION OF PEDRO RUBIO  
ESCOBAR, ESQ.**

1. I, Pedro Rubio Escobar, declare as follows:
2. I am a Partner (*socio*) of the law firm Ontier, Spanish counsel for Petitioners, Antonio del Valle, et al. (collectively the “Petitioners”). I am licensed to practice law in Spain, and I teach law at three Spanish universities. My practice focuses on arbitral, judicial, and administrative proceedings, particularly in regulated markets, including energy, telecommunications, and banking.
3. I respectfully submit this declaration to be attached to Petitioners’ Application and Petition for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding (hereafter, the “Petition”) to obtain discovery in the United States from third-parties Banco Santander S.A. (“Banco Santander”) and Santander Bank N.A. (“Santander U.S.A.”, and together with Banco Santander, “Santander”), in aid of a foreign proceeding currently pending before the Court of Justice of the European Union, known as *Del Valle Ruiz and Others v. European Commission and Single Resolution Board*, Case T-510/17, filed August 4, 2017, at the General Court of the Court of Justice of the European

Union (the “CJEU Litigation”), and an impending investment arbitration to be initiated against the Kingdom of Spain pursuant to the Agreement for the reciprocal investments between the Kingdom of Spain and Mexico (the “Investment Treaty Arbitration ”).

4. The facts set forth in this Declaration are based on my personal knowledge and my review of relevant documents and records. I am a native speaker of Spanish and am fluent in English.

## I. BACKGROUND

5. Petitioners are a group of Mexican investors that invested approximately 470 million Euros in shares and bonds of Banco Popular between December 2013 and June 2017.

6. Banco Popular Español, S.A. (“Banco Popular” or “BPE”), is a Spanish bank established in 1926. At the beginning of the 21st Century, BPE was renowned publicly as one of the most profitable banks in the world, with efficiency ratios significantly superior those of other banks. A true and accurate copy of the article “El Popular, cuarto banco más rentable” published by El País, together with a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 1**. The business model adopted by Banco Popular was focused on attracting deposits and providing credit to small and medium sized customers, mainly to families, self-employed workers, and small and mid-size businesses. The Banco Popular Group, as of December 31, 2016, consisted of a parent bank (Banco Popular), six subsidiary banks, four of which operate in Spain (Banco Pastor, Popular Banca Privada, Targobank and WiZink, the latter two with a percentage stake of 48.98% and 49%, respectively), one in Portugal (Banco Popular Portugal), one in the United States (TotalBank), and one financial group in Mexico (Banco Ve por Más (Bx+), with a 24.99%

stake). A true and accurate copy of excerpts of the 2016 Annual Report of Banco Popular (at page 16) is attached hereto as **Exhibit 2**.

7. Banco Santander is a Spanish banking company based in the city of Santander (Cantabria), with a history in banking dating back to 1856. A true and accurate copy of “Over a Century of History” on Santander’s website is attached hereto as **Exhibit 3**. Retail banking is their principal business segment. As of December 31, 2016, Banco Santander’s assets amounted to 1.339 trillion euros, making it the leading Spanish financial institution by volume of assets. A true and accurate copy of an excerpt of Santander’s 2016 Annual Report (page 106), is attached hereto as **Exhibit 4**. Santander is listed on the Madrid Stock Exchange (SAN) and the New York Stock Exchange (SAN) and is part of the Ibex 35, as well as the Dow Jones EURO STOXX 50. A true and accurate copy of “The Santander Share” on Santander’s website is attached hereto as **Exhibit 5**. It closed 2016 with a market capitalization of 72.3 billion euros, ranking as the largest bank in Spain, and the second largest company in Spain. A true and accurate copy of the letter from Davis Polk to the SEC with Santander’s Request for Exemptive Relief dated June 29, 2017 is attached hereto as **Exhibit 6**. The Santander Group includes a network of financial entities with a global presence, including the United States. *See Exhibit 4* at 33.

## **II. RESOLUTION OF BANCO POPULAR AND FORCED SALE TO SANTANDER**

8. In view of the deterioration of Banco Popular’s liquidity situation due to significant deposit withdrawals during the end of May and beginning of June 2017, on June 3, 2017, the European Union Single Resolution Board (“SRB”) required the Fondo de Restructuración Ordenada Bancaria (“FROB”) (the Spanish national resolution authority) to search for a potential buyer for the bank. A true and accurate copy of the SRB’s Marketing Decision of June 3, 2017 is attached hereto as **Exhibit 7**. The FROB initiated

this process by communicating to five Spanish financial institutions, announcing that the FROB was launching an auction for the sale of Banco Popular. *See* SRB’s Marketing Decision, **Exhibit 7**; a true and accurate copy of the redacted Process Letter the FROB communicated to the financial institutions on June 6, 2017 (the “FROB Process Letter”), as redacted prior to release, is attached hereto as **Exhibit 8**. On June 5, 2017, the FROB provided access to a Virtual Data Room to Santander and BBVA, the two entities that responded to the FROB’s request expressing interest in participating in the process by signing a confidentiality letter, both of which were approved by the European Central Bank. *See* FROB Process Letter, **Exhibit 8**; a true and accurate copy of “El BBVA estaba interesado en el Popular pero no le dieron tiempo” published by Diario16 on December 29, 2017, together with a certified translation from Spanish to English of the same is attached hereto as **Exhibit 9**. The virtual data room used for this auction process was the same virtual data room that Banco Popular had prepared for the ongoing private sale process it had launched months earlier. A true and accurate copy of the FROB Decision of June 7, 2017 is attached hereto as **Exhibit 10** (“During this procedure, interested parties signed pertinent confidentiality agreements and they were given access to the virtual data room set up by the entity as part of the private sale process carried out by it, granting them the time needed to submit binding offers.”)

9. On June 6, the European Central Bank informed the SRB that Banco Popular was failing or likely to fail. *See* FROB Decision, **Exhibit 10** at 1. The SRB then immediately declared that Banco Popular was failing or likely to fail and, in conjunction with the FROB, placed Banco Popular into resolution. The resolution was ordered and announced on June

7, 2017. A true and accurate copy of the Non-Confidential Version of the SRB Decision of June 7, 2017 is attached hereto as **Exhibit 11**.

10. On June 7, the SRB and FROB adopted and implemented the decision placing Banco Popular into Resolution. The resolution decisions of the SRB and the FROB applied the “sale of business tool;” that is, it wrote down all shares of Banco Popular and AT1 bonds to zero, converted AT2 bonds to shares, and transferred Banco Popular to Santander for the nominal amount of one Euro. *See* SRB Decision, **Exhibit 11**.

### **III. SANTANDER’S DUE DILIGENCE OF BANCO POPULAR AROUND THE PRIVATE SALE OF BANCO POPULAR**

11. Two months before its Resolution, in April 2017, Banco Popular initiated the process for a private sale of the bank. *See* SRB Decision, **Exhibit 11** at 6-7.

12. As part of the sale process, in approximately May 2017, Banco Popular prepared a Virtual Data Room where it hosted all the necessary financial information for interested entities to conduct their due diligence on Banco Popular. Banco Popular granted access to a number of financial institutions, including Bankia, Sabadell, CaixaBank, BBVA and Santander. *See* FROB Decision, **Exhibit 10**; a true and accurate copy of “Bankia tiene restricciones de tamaño para absorber Popular hasta diciembre” published by Cinco Días on May 24, 2017, and a certified translation from Spanish to English of the same, is attached hereto as **Exhibit 12**.

13. In May 2017, Santander carried out its due diligence on Banco Popular. José Antonio Álvarez Álvarez, Santander’s CEO, stated in October 2017 that Santander was later able to acquire Banco Popular in the very tight timeline provided by the FROB within the resolution process only because it had previously conducted a full due diligence on Banco Popular. A true and accurate copy of “Santander’s profit increases by 10%, spurred

by Brazil” published by *Expansión* on October 27, 2017, and a certified translation from Spanish to English of the same, is attached hereto as **Exhibit 13**.

14. Based on my experience as a lawyer (*abogado*) in Spain, I am of the opinion that as a result of this due diligence, it is reasonably likely that Santander would have gained access to a vast array of documents and information regarding Banco Popular’s finances, operations, and business. Although there is no public information regarding the contents of this virtual data room, based on my experience of market practices in mergers and acquisitions transactions, I am of the opinion that it is reasonably likely that the data room contained Banco Popular’s financial and marketing information for any interested purchaser to assess the feasibility of acquiring Banco Popular and determining the proper value and purchase price. The information contained in the data room would likely have included, at a minimum, Banco Popular’s documents and information regarding: (i) financial information for the last five to ten years; (ii) credit portfolio for the last five years; (iii) asset provisioning; (iv) evolution of deposits and information on withdrawals for the last five years; (v) reports and work on internal committees of Banco Popular, including any liquidity committee; (vi) communications with the Banco de España and the European Central Bank regarding regulatory minimums and any reports and documents regarding reviews from those entities; (vii) presentations to the Board of Directors regarding financial condition. This is all information that Petitioners do not currently have access to and require in order to pursue their claims in the CJEU Litigation and the Investment Treaty Arbitration.

#### **IV. SANTANDER’S CONTROL OF BANCO POPULAR AND BANCO POPULAR’S BOOKS AND RECORDS**

##### **A. Santander Acquired Control of BPE Through The Resolution Process**

17. As a result of the Decisions of the SRB and the FROB dated June 7, 2017, on that same day, Santander acquired “100% of Banco Popular Español, S.A.’s capital...” for one Euro (1 €), and therefore obtained full control of Banco Popular. A true and accurate copy of Santander’s Press Release “Santander acquires Popular, becoming the leading bank in Spain” of June 7, 2017 is attached hereto as **Exhibit 14**; *see also* SRB and FROB Decisions, **Exhibits 11 and 10**, respectively.

18. As from June 7, 2017, and as described below, Santander took numerous and immediate steps that demonstrate Santander’s complete control over Banco Popular and its unrestricted possession, custody and control of Banco Popular’s documents and information.

19. As Banco Popular’s sole shareholder, Santander took immediate steps on June 7, 2017 to control the management and oversight of Banco Popular. On that date, immediately after acquiring Banco Popular, Santander removed Banco Popular’s previous management team and appointed a new one. It also removed Banco Popular’s entire Board of Directors and appointed new directors, most of whom are connected to and/or serve on Santander’s Board of Directors. A true and accurate copy of Material Fact Notification No. 253044 published on June 7, 2017 is attached hereto as **Exhibit 15**. Banco Santander set the number of BPE board members to five and named José Antonio García Cantera (who had until that time been Director of Santander’s financial department), José Francisco Doncel Razola (Director of Accounting for Santander) and Francisco Javier García-Carranza Benjumea (Executive Vice President of Santander) as purportedly independent directors (*consejeros*); and Pedro Pablo Villasante Atienza and Gonzalo José Alonso Tejucá as proprietary directors (*consejeros dominicales*). The new Chairman of the Board, Rodrigo Echenique Gordillo, is president of Santander Spain and vice-president of Banco Santander. A true

and accurate copy of the publication of Banco Popular's Board of Directors is attached hereto as **Exhibit 16**.

20. That same day, on June 7, 2017, Banco Santander also convened a conference call with the intention of informing analysts of its acquisition of BPE. A true and accurate copy of Material Fact Notification No. 252994 for Banco Santander dated June 7, 2017 is attached hereto as **Exhibit 17**. Banco Santander also published a detailed presentation summarizing the financial information that demonstrated why the BPE acquisition made sense for Santander. A true and accurate copy of Santander's presentation dated June 7, 2017, published as Material Fact Notification No. 252995 dated June 7, 2017, is attached hereto as **Exhibit 18**. This presentation analyzed the details of Banco Popular's acquisition, giving specific data on the combined market shares of both entities, the total number of combined branches, productive and unproductive assets, deposits, SMEs, in addition to other financial information regarding Banco Popular. This presentation also contained consolidated results and information on the combined entity after full integration of Banco Popular into Santander. In that presentation, Santander announced that it would carry out a capital increase in the amount of approximately 7 billion Euros in order to facilitate Santander's acquisition of BPE. *Id.*

21. Because the information reflected in that presentation does not appear to have been publicly available, I am of the opinion that it is reasonably likely that the presentation was prepared at least in part with information gathered by Santander from the documents and information obtained during the due diligence carried out in the private sale process. *Id.*

22. On July 3, 2017, Santander issued consolidated financial statements at the end of the first half of 2017, indicating that Banco Popular and its subsidiaries had been

consolidated into the Santander Group accounts as from their acquisition on June 7, 2017. A true and accurate copy of Santander's consolidated financial statements published July 3, 2017 is attached hereto as **Exhibit 19**. As these financial statements show, Banco Popular's results were incorporated into Grupo Santander's financial results as of June 7, 2017. *Id.* at 95. Santander expressly confirmed that Banco Popular has been integrated into Santander group's various public financial statements. A true and accurate copy of Santander's Financial Report January-June 2017 is attached hereto as **Exhibit 20**; a true and accurate copy of the presentation "1H17 Earnings Presentation" dated July 28, 2017 is attached hereto as **Exhibit 21**. The consolidated financial statements were prepared based on the consolidated information of various subsidiaries and companies controlled by the Santander Group, including Banco Popular.

23. On July 3, 2017, Santander further confirmed its control over Banco Popular by officially announcing the capital increase for 7 billion euros to obtain proper coverage for the acquisition of Banco Popular. True and accurate copies of the announcement of the capital increase made for the U.S. market and the press release published on Santander's website are attached hereto as **Exhibits 22** and **23**, respectively.

24. Santander took all these steps before obtaining the necessary approval from the European Commission from an antitrust and competition perspective. Despite only having a partial dispensation from the European Commission, as of June 7, 2017, Santander took active steps to integrate Banco Popular, and operated as if Banco Popular had already been fully integrated within Santander. A true and accurate copy of the European Commission's decision of partial dispensation dated June 7, 2017 is attached hereto as **Exhibit 24**. In fact, that Banco Popular has been integrated into Santander has been expressly confirmed

through public statements of Santander’s President, Ana Botín, as early as June 7, 2017, and by Rodrigo Echenique, Santander Spain’s President, Banco Santander’s vice President, and Banco Popular’s most recent President. *See* Santander’s Press Release “Santander acquires Popular...”, **Exhibit 25** (“The combination of Santander and Popular strengthens the Group's geographic diversification...”); a true and accurate copy of Santander’s Press Release “Banco Popular agrees to sell majority stake in its real estate asset portfolio to Blackstone” dated August 8, 2017 is attached hereto as **Exhibit 26** (“The agreement [with Blackstone] significantly reduces our real estate exposures and further strengthens our balance sheet, allowing us to focus all our efforts on supporting customers. It is an important step in the integration process and demonstrates the quality of our execution capabilities.”).

#### **B. Santander’s Sale of Banco Popular’s Assets**

25. On August 8, 2017, the European Commission granted its authorization for the acquisition of Banco Popular by Banco Santander after concluding that the operation did not affect competition on the European financial market. A true and accurate copy of the European Commission Press Release of August 8, 2017 is attached hereto as **Exhibit 27**. This decision formally authorized Santander to have and exercise full control over Banco Popular.

26. The same day it obtained the European Commission’s authorization, on August 8, 2017, Santander confirmed the sale of 51% of Banco Popular’s real estate business to Blackstone. *See* Santander’s Press Release dated August 8, 2017, a true and accurate copy of which is attached as **Exhibit 28**; a true and accurate copy of Material Fact Notification No. 255751 of August 8, 2017 is attached hereto as **Exhibit 29**. As such, Santander sold

the controlling share of Banco Popular's real estate business, consisting of the portfolio of foreclosed real estate, distressed debts in the real estate sector, and other assets related to this activity of Banco Popular and its subsidiaries. *Id.*

27. The decision to sell Banco Popular's real estate portfolio was made by Santander as the sole and controlling shareholder of Banco Popular, and in the exercise of its operational control over Banco Popular. As announced to the press on July 6, 2017, "Santander is seeking 5 billion euros for half of Popular's real estate portfolio, valued at around 30 billion euros." A true and accurate copy of "Blackstone, Apollo y Lone Star pujan por los activos tóxicos de Popular" published by Expansión on July 7, 2017, and a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 30**. This announcement further stated that, "Santander has shortlisted Blackstone Group, Apollo Global Management and Lone Star Funds to submit bids for 51 percent of the assets." *Id.* As these statements demonstrate, the transaction in Banco Popular's assets was carried out and announced by Santander, which indicates Santander's total effective control of Banco Popular.

28. In the ensuing months, Santander continued to sell Banco Popular's assets. For instance, on September 6, 2017, Santander sold 100% of the shares of Banco Popular Portugal, S.A. to Banco Santander Totta, S.A. (a Portuguese bank belonging to the Santander Group). A true and accurate copy of Material Fact Notification No. 256093 for Banco Popular dated September 6, 2017 is attached hereto as **Exhibit 31**. On December 1, 2017, Santander sold 100% of the shares of TotalBank (a Banco Popular subsidiary in Florida, United States) for \$528 million to BCI. A true and accurate copy of Material Fact Notification no. 259045 for Banco Popular dated December 1, 2017 is attached hereto as

**Exhibit 32;** a true and accurate copy of “Santander vende la filial estadounidense de Popular a BCI por 444 millones” published by *Expansión* on December 1, 2017, and a certified translation from Spanish to English of the same, is attached hereto as **Exhibit 33**. In announcing that sale, the president of Santander stated as follows: “We are meeting the objectives we set for ourselves after the acquisition of Popular. We have expanded capital, strengthened the balance sheet, and recovered customer confidence. Although TotalBank is a good bank, it does not fit with our presence in the United States, so we decided to sell it to BCI, a solid organization that we know well.” *Id.*

29. Santander, as sole shareholder of Banco Popular, necessarily had possession, custody and control of Banco Popular’s books and records in order to be able to carry out these transactions.

**C. Santander’s Commercial, Operational and Financial Integration of Banco Popular**

30. In July 2017, a number of former Banco Popular investors—not including the Petitioners in this matter—who had lost their investments because of the BPE Resolution and forced sale to Santander filed suit, seeking provisional measures against Santander. These investors requested the Spanish courts to prevent Santander from taking any steps to implement Santander’s acquisition and integration of Banco Popular until the legitimacy of the FROB’s decision to implement the Resolution of Banco Popular was judicially determined. A true and accurate copy of “Inversores pillados en Popular ultiman la mayor demanda contra Santander, de 100M” published by *Vozpópuli* on July 21, 2017, and a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 34**. On or around September 28, 2017 the Spanish courts (the *Audiencia Nacional*) rejected the investors’ request for provisional measures. A true and accurate copy of “La Audiencia

Nacional rechaza suspender la venta de Banco Popular y dice que el papel del FROB fue “instrumental” published by eldiario.es on September 29, 2017, and a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 35**.

31. As of September 28, 2017, when the application for provisional measures was dismissed, no doubts remained regarding Santander’s effective control over Banco Popular, as evidenced by the series of actions taken by Santander, detailed in the following paragraphs.

32. The operational and commercial integration of Santander and Banco Popular began with the redesign of the signs of Banco Popular’s offices, which began in October 2017. A true and accurate copy of “Banco Santander comienza la integración con el Popular con el rediseño de los rótulos de las oficinas” published by ABC on October 4, 2017 is attached hereto as **Exhibit 36**. This was the first “visible” indication of the integration of both banks. All signage on Banco Popular’s branches were changed, with the added logo of “Grupo Santander” under the logo of “Banco Popular”, marking the integration of Banco Popular into Santander. *Id.*

33. Santander also has publicly announced its plans to fully integrate Banco Popular with Santander, which, as announced by Santander, will entail the closure of offices and the dismissal of workers in 57 locations throughout Spain. A true and accurate copy of “El ERE del Popular propuesto por el Santander afectará a 58 centros y sucursales” published by El Confidencial on November 9, 2017, and a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 37**. As part of the plan to reduce its workforce, Santander put out an option plan to about 1,100 employees giving them the choice to depart through early retirement or an incentivized departure. A true and accurate

copy of “Cerca de 900 trabajadores ya se han adherido de forma voluntaria al ERE por la integración de Santander y Popular” published by Expansión on January 21, 2018, and a certified translation from Spanish into English of the same, is attached hereto as **Exhibit 38**.

34. In October 2017, Banco Santander published its results for the third quarter of 2017, describing the actions that Banco Santander had taken in relation to Banco Popular, and including BPE in the annual statements and balance sheets of Banco Santander and its group. A true and accurate copy of excerpts from Santander’s Financial Report January-September 2017 is attached hereto as **Exhibit 39**; a true and accurate copy of excerpts from “9M’17 Earnings Presentation” dated October 26, 2017 is attached hereto as **Exhibit 40**.

35. In relation to some of the former shareholders of Banco Popular, on December 12, 2017, Santander communicated the approval of a public offering of contingent redeemable perpetual bonds of Banco Santander (“Fidelity Bonds”), offered by Santander to former BPE retail investors who lost their investments in BPE as a result of Banco Popular’s resolution. A true and accurate copy of Material Fact Notification No. 259557 of Santander dated December 15, 2017 is attached hereto as **Exhibit 41**. Those who purchase these so-called Santander “Fidelity Bonds” are required to release any claims against Santander related to the resolution of Banco Popular. The bonds were not offered to institutional investors such as Petitioners.

36. There is no legal impediment under the laws of Spain that would preclude a request for documents and information in a foreign jurisdiction. Nor would such a request be contrary to Spanish public policy.

\* \* \*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Madrid, Spain, on March 5, 2018.



Pedro Rubio Escobar